IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 320

DANIEL O'DONNELL,

Petitioner,

vs.

GREAT LAKES DREDGE AND DOCK COMPANY,
A CORPORATION,

Respondent.

REPLY BRIEF.

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SUBJECT INDEX.

Table of Cases and Authorities.

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REPLY BRIEF.

Petitioner's brief fully concedes that decisions of the lower federal courts deny the protection of the Jones Act to seamen injured on land; that dicta of this court have indicated the same view; and that this Court has denied certiorari in such cases, although this constitutes no determination on the merits.

It may be proper, however, to call attention to the fact that *State Industrial Commission* v. *Nordenholt Corporation*, 259 U. S. 263 (1921), relied upon by the respondent as the first decision of this Court under the Jones Act, involved an accident prior to the passage of the Jones Act and makes no reference to that Act.

In the present case the Circuit Court of Appeals found that it must "unfortunately" follow certain decisions of other courts and unnecessary dicta of this Court, but this Court is not in such an unfortunate position.

The present case for the first time presents to this Court the issue as to (1) the construction of the Jones Act, and (2) as to the validity of the act if construed to mean what it says.

The Terms of the Jones Act Apply to Injuries on Land.

Respondent does not and cannot deny that the act seeks to apply itself to the whole course of the seamen's employment, which may be either on navigable waters or on land.

The terms of the act are sufficiently analyzed in pages 10 to 16 of petitioner's brief, submitted with his petition for certiorari. This analysis is not challenged by respondent, except for the allegation that the Jones Act is remedial and applies only to procedural matters, and that jurisdiction of maritime torts is substantive. Respondent's argument appears to be that the extension to a seaman in the course of employment of the "right or remedy" of the Federal Employers' Liability Act extends to him only the procedural and not the substantive rights which are given by that act. This argument is neither material nor relevant, and is clearly negatived by the terms of the Jones Act. In contradiction of its own argument, respondent properly quotes from *Panama R. R. Co. v. Johnson*, 264 U. S. 375, 388 the statement that the Jones Act applies to admiralty "new rules drawn from another system."

In *Arizona v. Anelich*, 298 U. S. 110, 119, this Court said that the Jones Act "brings into the maritime law new rules of liability", but that it did not introduce assumption of risk as a defense. New liabilities are not merely procedural.

The construction of the Jones Act not to apply to injuries on land has been found by the courts, and not in the language of the statute. The issue here is one as to whether this Court must restrict the application of the statute to navigable waters in order to sustain its validity.

Injuries to Seamen on Land Are Within Admiralty Jurisdiction.

It cannot be denied that admiralty law has long accorded a remedy to seamen injured both on land and on navigable waters. Both are within admiralty jurisdiction, and Congress has authority to determine remedies for both. The remedy of unseaworthiness in its nature applies only to injuries on the vessel. It is subject to change, extension or replacement, by act of Congress. *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 256. The remedy of maintenance and cure has long applied both to navigable waters and to the land, and is equally subject to change or extension, or to the provision of a new and additional remedy. The Jones Act provides a remedy for injuries both on land and on water. The remedy so far as it relates to injuries on shore is elective as against the remedy existing under state law, and is available in both state and federal courts.

It is contended that the injury on shore is a tort to which admiralty jurisdiction cannot extend, and which can be governed "only by the law of the locus," which, in Respondent's opinion, means only the law of the state. Under this contention, there is one remedy for the same injury under admiralty jurisdiction, but Congress has no authority to provide a uniform additional remedy for the same injury, which may be employed in substitution for variant state remedies. It is contended that this cannot be done, although the injury itself is within admiralty jurisdiction; the "locus" of the tort is within the territorial jurisdiction of the national government, and to deny power to Congress limits and divides jurisdiction with respect to the same admiralty transaction.

Under Respondents' contention, admiralty jurisdiction extends to seamen on navigable waters, and permits change or extension of remedies by Congress; and admiralty juris-

diction extends to seamen on land, but does not permit a change or extension of remedies by Congress. Admiralty has jurisdiction over the injury through the remedy of maintenance and cure, but Respondent alleges that this will not justify the establishment of jurisdiction as to another remedy for the same injury.

There is no basis for the contention that admiralty jurisdiction cannot be applied to a tort committed on land. In the absence of federal statute, the jurisdiction was in the state courts, and there remains a right to elect the remedy under state law.

There is no question but that the law of the state applies to a tort committed on land if Congress has not provided otherwise, or if the injured seamen elects to proceed under state law rather than under the Jones Act. Where, by such election the common law of the state applies, this Court has properly said in *Beadle* v. *Spencer*, 298 U. S. 124, 129, that "the common law may apply a different rule to an injury similarly inflicted on the wharf to which the vessel is moored". But this does not restrict the power of Congress, which is explicitly recognized in *State Industrial Commission* v. *Nordenholt Corporation*, 259 U. S. 263. That case presented the issue as to whether a state workmen's compensation act was properly applicable to personal injuries received on land. This Court said, at page 276: "There is no pertinent federal statute; and application of the local law will not work material prejudice to any characteristic feature of the general maritime law". The issue is one as to the authority of Congress to prescribe an elective remedy for an injury on land when the injury is by other principles of law recognized as within admiralty jurisdiction. The scope of admiralty jurisdiction as to all remedies for the same injury is not determined by whether the liability is a contractual or a tort liability.

This Court has explicitly held that a tort liability with respect to an injury to property "attached to the realty" is within admiralty jurisdiction. *United States* v. *Evans*, 195 U. S. 361. This defeats the whole argument of Respondent, for it cannot be argued that jurisdiction over torts on land exists for injury to property but not for personal injuries.

Even if admiralty jurisdiction were restricted to contractual liability for injuries incurred on land, the remedy under the Jones Act may be regarded as contractual and was so regarded in *Benedict's American Admiralty*, 5th Ed. (1925) Vol. 1, page 32, quoted at page 16 of petitioner's original brief. The remedy accorded by the Jones Act is limited to the course of the employment, and is as closely related to the contract of employment as are maintenance and cure.

Nor is there any constitutional restriction against substituting a non-tort for a tort liability in admiralty. This Court has said that workmen's compensation does not create a tort. (*Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 157-158), and it has also said that what was a tort liability for unseaworthiness can be replaced in admiralty by workmen's compensation. *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 256.

The respondent contends that where two remedies for the same injury exist in admiralty, the one may be changed or supplemented, but not the other. Petitioner's contention is that all remedies in admiralty can be changed or supplemented by Congress, and that the grant of admiralty jurisdiction vests such powers in Congress. The act of Congress has here merely given an elective and supplemental remedy with respect to an injury clearly recognized in admiralty by virtue of an unchallenged admiralty remedy of maintenance and cure.

The constitutional authority of Congress is not limited

by the fact that state law controlled injuries to seamen on land, other than maintenance and cure, until some change in that law was made by the Seamen's Act of 1915; and a full alternative remedy was provided by the Jones Act in 1920. Congressional power applies to the whole field of "admiralty and maritime jurisdiction," and the authority of Congress is "not limited by previous decisions as to the extent of the admiralty jurisdiction." *Detroit Trust Co.* v. *Barlum*, 293 U. S. 21, 52. Nor is this Court bound by previous decisions as to the scope of admiralty jurisdiction when "convenience and reason demand" the abandonment of a rule no longer applicable. *United States* v. *Evans*, 195 U. S. 361. The position abandoned in the *Evans* case is parallel to that here involved. This Court there abandoned "the rule determining the admiralty cognizance of torts by place", and held a vessel liable for injury to a beacon "attached to the realty". In the present case we have a congressional determination of liability of the vessel with respect to a service rendered for the vessel by a seaman "in the course of his employment."

The Jones Act Is Sustainable Under the Commerce Clause.

The power of Congress to regulate interstate and foreign commerce is, of necessity, closely related to the powers vested in Congress by admiralty and maritime jurisdiction of the federal courts. Dicta of this Court to the contrary are cited in petitioner's brief (page 20), and are relied upon by respondent (page 20). This interrelation is clearly indicated by *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, 213, and *National Labor Relations Board* v. *Waterman Steamship Corporation*, 309 U. S. 206.

Respondent seeks to distinguish the *Jensen* case on the ground that the Federal Employers' Liability Act governs only the boats which are a part of the railroad's equipment. But such boats are equally governed by ad-

miralty rules, and the Federal Employers' Liability Act applies to their seamen, whether on water or on land. And, even though the liability were a tort liability, it has become subject exclusively to a federal act, whether on land or water.

Respondent seeks to distinguish the *Waterman* case on the ground that it does not extend "maritime jurisdiction to torts occurring on shore" and that "in matters *ex delicto* jurisdiction is established by the *lex locus*". The federal act is a part of the *lex loci*, if valid; and may properly be treated as a part of the seaman's contract rather than as a tort; and, if it be treated as a tort, Congress has authority to enact it, if it relates to remedies within admiralty and maritime jurisdiction. It should also be remembered that in *United States* v. *Evans*, 195 U. S. 361, this Court rejected the so-called *lex loci* rule with respect to an admiralty tort.

With respect to the relation between congressional powers arising from admiralty jurisdiction and from the commerce clause it is only necessary to read together the federal statutes dealing with labor generally and with seamen.

Conclusion.

In his original brief (pp. 24-25), petitioner has sufficiently stated the results of the present construction of the Jones Act by lower federal courts. Two seamen injured in the same transaction may have essentially different remedies; and a seaman injured on land in one state may have a remedy entirely different from a seaman injured in another state. The purpose of the Jones Act was to give a common remedy if the seaman should choose to elect it.

The common law remedy under various state laws differs from the remedy under the Jones Act; and the remedy

under the Jones Act presents a more adequate relief than that under a number of the state workmen's compensation statutes. There is therefore an advantage to the injured seaman in giving him this alternative remedy, and in applying it, as the statute provides, to all injuries in "the course of his employment", irrespective of where that course of employment may require him to work.

Respectfully submitted,

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